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In the Matter of the Estate of Robert L. Proudfit : Brief of Appellant

Utah Supreme Court

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7405

In the Supreme Court

of the State of Utah

In the Matter of the Estate of

ROBERT L. PROUDFIT,

Deceased.

Case No. 7405

BRIEF OF APPELLANT

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STATEMENT OF FACTS

This is an appeal from an order fixing the Utah Inheritance Tax in the above entitled estate and directing payment thereof (R. 40-43). There is no substantial controversy as to the facts the argument being as to the legal effect thereof.

Robert L. Proudfit died testate, a resident of Weber County, State of Utah, on the 14th day of May, 1948.

His will was duly admitted to probate and Jeanette R. Proudfit, who was named executrix under the will, qualified and was appointed as executrix (R. 5, 6 and 10).

Robert L. Proudfit left an estate consisting of personal and real property. The real property is located in Weber County, State of Utah, and consists of three lots improved with eight small single dwelling houses and one small duplex dwelling house (R. 0-3). The personal property consists of shares of stock, cash on deposit in banks, and miscellaneous items of personal property consisting of electric stoves, refrigerators, and other miscellaneous items (R. 0-3). All of the real and personal property after the payment of funeral expenses, debts and other liabilities of the deceased was devised to Jeannette R. Proudfit, who is the executrix herein. (R. 7, 8, 11, and 12). For inheritance tax purposes the gross estate of the decedent was appraised at the sum of $220,711.58 (R. 18-20).

The executrix filed an inheritance tax return and in such return claimed certain deductions which the court allowed in its order fixing the Utah inheritance tax and directing payment thereof. It is the contention of the appellant herein that the court erred in allowing the following deductions shown on the inheritance tax return (R. 36 and 37). Those deductions are:

1. $247.75 for garden labor, maintaining and preserving real estate.

2. $280.00 for labor and management services on rented real estate.
3. $33.35 for repars to preserve heating system in rented real estate.
4. $1,056.17 for heating costs and discharging decedent's obligation as landlord of rented real estate.
5. $882.52 for general repairs necessary to maintain and preserve real estate and discharge decedent's obligation.
6. $59.90 for electric power and repairs on stoves and refrigerators on rented property, in compliance of obligation by decedent as landlord.
7. $133.15 for water charges incident to maintenance and preserving real estate and serving tenants of real property.
8. $188.92 for insurance premiums on real estate improvements and furnishings.

These expenses were incurred after the death of the decedent and during the administration of the estate, which required a year and a few weeks, in the operation of ten rental units, those units being the real property heretofore referred to (R. 48 and 49). It does not appear from the record that these expenditures were expressly approved by the probate court prior to the time when they were incurred.

The evidence taken at the hearing on the order to determine the amount of the Utah inheritance tax was

to the effect that these rental units had been managed for a period of ten years prior to the death of the decedent by Robert L. Proudfit, Jr., a son of the decedent, and that since the death of the decedent, Robert L. Proudfit, Jr., has continued to manage these rental units for the executrix (R. 50 and 51). At the time of the decedent's death all ten rental units were rented and for all practical purposes had been rented during the entire administration of the estate (R. 51). These ten units are located on the three lots of real property, which lots are all adjacent to one another thereby making one lot, and are arranged about a court, commonly known as Custer Place or Custer Court. There are lawns and gardens about the premises and a central heating system which heats all ten units. The court is operated in much the same manner as an apartment house, even though they are separate houses, and many of the same services as are ordinarily furnished to tenants of an apartment house, are furnished. The lawns and gardens about the court were maintained by the decedent as landlord. All ten units were heated from a central heating system and the cost of furnishing heat has been assumed by the decedent as landlord. The decedent as landlord maintained the houses inside and out, cleaning the premises at regular intervals, papering, painting and making repairs to the premises as were necessary from time to time. The decedent as landlord furnished electric stoves and refrigerators, replacing or repairing them when necessary. The water used by the tenants

was furnished by the decedent. The decedent kept the real estate and the improvements thereon insured (R. 51-53).

The deductions which are in dispute herein are the costs of furnishing these various services. The rental units were operated in the same manner during the administration of the estate as they had been operated for the last ten years. No services were furnished during the administration of the estate that it had not been the custom of the decedent to furnish prior to his death (R. 54-56). There was nothing unusual about the expenses incurred during administration of the estate as compared with the expenses which arose in the operation of these units prior to the death of the decedent. The expenses of furnishing the above services were taken into account in determining the amount of rents to be charged on the various units and it does not appear from the evidence that the rents received during the administration were not sufficient to pay the cost of furnishing these services (R. 53, 54 and 55). Nine of the units rented for $48.75 per month and one unit rented for $42.50 per month, making a total of $481.25 per month, or $5,775.00 per year (R. 58).

The amounts received as rentals during the administration of the estate have not been included as an asset of the estate in the inheritance tax return (R. 35-38). Nor were they included in the gross appraised value of

the estate by the appraisers in determining the value of real estate at the time of the decedent's death, except that the appraisers may have considered the rental value of the property at the time of decedent's death in making their appraisement (R. 18-20).

The rental units were listed with the Office of Price Administration of the Federal Government and subject to the rent control act. At the time the units were registered with the Office of Rent Control the services which were being furnished by the landlord or decedent, which are the same as were furnished during the administration of the estate, and which are the same for which deductions are now claimed, were declared and were presumably taken into account by the Office of Rent Control in arriving at the amount of rent to be charged for each rental unit (R. 57).

It is further stipulated between counsel for all parties concerned that it has been the practice of the State Tax Commission of the State of Utah for at least the last four years to disallow the kind of deductions that is claimed and in dispute in this estate (R. 59).

STATEMENT OF ERRORS RELIED UPON

The appellant, the State Tax Commission, relies on the following errors for a reversal of the order appealed from:

1.

The court erred in its conclusions of law that the following sums paid by the executrix for the purposes hereinafter stated were lawful deductions in determining the net estate of the decedent for inheritance tax purposes and that Utah inheritance tax should be computed without allowances of such claimed deductions:

1. $247.75 for garden labor, maintaining and preserving real estate.

2. $280.00 for labor and management services on rented real estate.

3. $33.35 for repairs to preserve heating system in rented real estate.

4. $1,056.17 for heating costs and discharging decedent's obligation as landlord of rented real estate.

5. $882.52 for general repairs necessary to maintain and preserve real estate and discharge decedent's obligation.

6. $59.90 for electric power and repairs on stoves and refrigerators on rented property, in compliance of obligation by decedent as landlord.

7. $133.15 for water charges incident to maintenance and preserving real estate and serving tenants of real property.

8. $188.92 for insurance premiums on real estate improvements and furnishings.

QUESTIONS INVOLVED

The primary question which is before the court for decision is whether the trial court erred in holding that all deductions claimed by the executrix are just and proper deductions.

As we view it the decision in the case depends upon the answer to the following questions:

(1) Were the deductions set forth in the Statement of Errors necessarily incurred in the preservation of the estate and, therefore, deductible as a cost or expense of administration?

(2) Should the expenses claimed be taken out of rental income produced by reason of such expenditures?

(3) Are the claimed deductions debts owing by the decedent at the time of his death?

ARGUMENT

I.

Were the deductions set forth in the Statement of Errors necessarily incurred in the preservation of the estate and, therefore, deductible as a cost or expense of administration?

The problem presented in this portion of the argu-

ment depends upon the construction to be placed upon that portion of 80-12-8, Utah Code Annotated, 1943, which reads as follows:

> "* * * the costs and expenses of administration * * *"

Admittedly an expense incurred in the preservation of a decedent's estate is a cost of administration and the representative of an estate incurring such expense should be allowed to deduct such expense for the purpose of determining the net estate of the decedent for inheritance tax purposes, but the representative of the estate has the burden of showing that the expenses were necessarily incurred in good faith for the preservation of the real property and not for some other purpose.

It is submitted that the court in construing 80-12-8 U. C. A. 1943, should consider the construction placed upon such statute by the Tax Commission.

It is stipulated by counsel representing the parties herein that it has been the practice of the Tax Commission for a period of at least four years, to disallow the deductions which are claimed and disputed in this estate (R. 59). There is no further evidence in the record with regard to how long such interpretation has been placed upon the statute. However, it is submitted that in no case has the Commission allowed this type of deduction in computing the net estate of a decedent for

inheritance tax purposes. Admittedly a misinterpretation of a statute gives no regularity to such interpretation. However, the Supreme Court of Utah, in the case of *Board of State Land Commissioners v. Ririe,* 56 Utah 213, 190 Pac. 59, said:

> "While it is true that the construction of a statute by the executive department is not binding upon the courts, it is, nevertheless, also true, and is so determined by the overwhelming weight of authority, that unless such construction does violence to the apparent intent of the language used it is entitled to serious consideration by the courts, and especially so if the statute has been in force for any great length of time and has been so construed."

This statement of the law was acquiesced in by this court in *In re Cowan's Estate,* (1940) 98 U. 393, 99 Pac. 2d 605, and was reaffirmed in the case of *Utah Concrete Products Co. v. State Tax Commission* (1942), 101 U. 513, 125 Pac. 2d 408, and *E. C. Olsen Co. v. State Tax Commission,* 168 Pac. 2d 332.

The interpretation of the Commission as to what constitutes "costs of administration" is a practical interpretation of the statute and certainly does no violence to any apparent intent of the language used. We, therefore, submit that such interpretation is entitled to serious consideration by this court.

The State Tax Commission has no published regu-

lations setting forth its interpretation of our inheritance tax law. However, it is guided, wherever possible, by regulations of the Bureau of Internal Revenue.

A clear definition of administrative expenses is found in Regulation 105 relating to estate tax under the Internal Revenue Code of the Federal Government, Section 81-32 as follows:

> "The amounts deductible from the gross estate as 'administrative expenses' are such expenses as are actually and necessarily incurred in the administration of the estate; that is, in the collection of the assets, payment of debts, and distribution among the persons entitled. The expenses contemplated by law are such only as attend the settlement of an estate by the legal representative preliminary to the transfer of the property to the individual beneficiaries or to a trustee, whether such trustee is an executor or some other person. *Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions.* Administration expenses include (1) executor's commission, (2) attorney fees, and (3) miscellaneous expenses." (italics ours)

Miscellaneous expenses are defined by Section 81-35 of the same regulation as:

> "This includes such expenses as court costs, surrogate's fees, accountants fees, appraisers fees, clerk hiring, etc. Expenses necessarily incurred

in preserving and distributing the estate are deductible including the cost of storing or maintaining property of the estate, if it is impossible to effect immediate distribution to the beneficiaries. Expenses for preserving and care for property may not include outlays for additions or improvements; nor will such expenses be allowed for a longer period than the executor is required to retain the property. A brokerage fee for selling property of the estate is deductible *if the sale is necessary in order to pay the decedent's debts, the expenses of administration or to effect distribution.* Other expenses accompanying the sale are deductible such as the fees of an auctioneer if it is reasonably necessary to employ one." (italics ours)

"Generally speaking, the expenses of administering a decedent's estate are to be deducted from the gross value of the estate in arriving at its clear or net value for inheritance tax purposes; but the rule does not extend to excessive expenses, nor does it necessarily apply to every expenditure by an executor or administrator, even though the expenditure in question is a proper and legitimate one, allowable as a disbursement on the final settlement of the estate . . ." 61 C. J., Section 2592, Page 1704.

"An executor or administrator, in the absence of a statute or will conferring upon him possession or management of the real estate, is under no duty to make repairs or improvements. Where, however, under the local administration laws possession of the realty is vested in a personal representative, he should preserve the value of the real

> estate by making necessary repairs. This does not, in general, mean that he may expend money in the erection of a new building, but merely that he may expend it in repairs to the extent necessary to preserve the property. In other words, he can properly make expenditures for necessary repairs only . . .'' 21 Am. Jur., Executors and Administrators, Section 294, Page 547.

In discussing Section 7718, Compiled Laws of Utah 1907 which provided among other things that an administrator ''must keep in good tenantable repair all houses, buildings and fixtures'' on real estate under his control and in discussing Section 7739 which provides ''he shall be allowed all necessary expenses in the care, management and settlement of the estate'', the Supreme Court of Utah in the case of In re Hansen's Estate, 55 Utah 23, had this to say on page 41:

> ''The question of the allowance for improvements must be determined from the facts in each particular case, bearing in mind that such improvements must be proven to have been reasonably necessary and made in good faith for the benefit of the estate.''

In a case decided by the Supreme Court of Utah, September 28, 1945, In re Smith's Estate, Davies vs. Smith, et al, 162 Pacific 2d 105, the facts are as follows: Elias M. Smith died October 22, 1937, leaving an estate consisting principally of two farms which were located

about 165 miles west of Fillmore, Utah. By the terms of the will William B. Davies, son-in-law to the deceased, was named to act as executor without bond. He was directed to: "rent or operate my main ranch at Garrison, Utah, (at present consisting of 160 acres) and sell the estate's share of the crop after retaining enough for feed and seed and after paying taxes, insurance, and other essentional expenses of the ranch (including taxes, and insurance on my present home or house and four acres) shall turn over to my wife, Mary H. Smith, these net proceeds of the ranch for her own personal needs."

> "The executor in his individual capacity owned a ranch in the immediate vicinity of the estate farms. He operated, with his brother, a large number of cattle and had some grazing permits on public domain. His operation of the estate lands was closely allied with the operation of his own lands. He, without court approval, leased the estate's farm to himself in 1938, 1939, and 1940. During other years he personally purchased the produce from the estate's farm. He purchased lumber for the purpose of building feed racks on the estate's farm and then used those racks in the feeding of his own livestock. When the farm was leased to third persons he failed to get approval of the lease. Men hired to work on the estate's farm were also, during substantially the same period, employed by him to work on his own lands . . . The record does not show that the executor was guilty of overreaching in his dealings with the estate, but it does show that he thoroughly mixed his own personal business with that of the estate."

When the executor filed his account with the court certain expendtiures were questioned. Among others were $9.68 for 48 fence posts for the upkeep of the premises and $14.00 to Chester Hornbeck for wire for the premises. The district court disallowed these items and the Supreme Court refused to change the ruling, quoting the case of In re Hansen's Estate (previously cited), holding that since he failed to get approval from the court for the capital improvements, the burden should be on him to show that they were for the benefit of the estate. (Which he had not done.)

Thus it will be seen that in order for an item to be deductible as an administrative expense upon the theory that the expense was incurred for the preservation of the assets of the estate, the person claiming the deduction must bear the burden of showing that the expenses were incurred for the benefit of the estate and not the heirs, legatees or devisees, and the expenses must be proven to have been necessary and made in good faith for the benefit of the estate. In this case there is absolutely no proof that the expenses incurred were necessary. In fact, it affirmatively appears that some charges, such as the charge of maintaining the temperature in the rental units at 72°, were not such items as would be necessarily incurred in the preservation of an estate and could not under any circumstances have benefited the estate. Moreover, we must keep in mind that the rental units in connection with which these charges

were incurred produced an income in the amount of $481.25 per month, or $5,775.00 per year, which income is far greater than the expenses incurred during the same period of time. Therefore, it affirmatively appears that the expenses were not incurred primarily for the benefit of the estate, but were incurred in the production of rental income, and that they are, therefore, not administrative expenses.

II.

Should the expenses claimed be taken out of rental income produced by reason of such expenditures?

An old case directly in point is the Colorado case of People vs. Palmer's Estate, found at 139 Pacific 554, 25 Colo. app. 450, decided by the Supreme Court of Colorado. In that case the court was construing the following statute:

> "All property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, . . . shall be and is, subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the state and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed . . ."

While this statute does not provide for deduction

of administrative expenses, the court in discussing this statute said:

> "Everything bequeathed or devised passes to the heir, and nothing is deducted from that which passes, or ought to be deducted; not even the debts of the decedent or expenses of administration are deducted from that which passes, but in contemplation of the law, before the passing takes place, as nothing can pass until the debts are paid, including the debts of the estate, such as expenses of administration. The statute says that the tax is to be paid on the value of everything that passes by the will or the law, and not on what the heir actually receives, although it makes no difference because the heir actually receives everything that is bequeathed or devised; nothing can be devised or bequeathed except what is left after the obligations of the decedent and expenses of administration are paid."

Thus it appears that the court had in mind that administrative expenses should be deducted before the tax is levied even though the statute did not specifically so provide. In spite of this language the court refused to allow a deduction of $25,000 expended by the executors during the administration for the "upkeep" of the home of the decedent and said:

> "The $25,000 item is so clearly a charge against the devisees expended to preserve the property devised to them, and which, as provided by the statute, vested in them and to be appraised of as of the time of death, that reference to it is

> not necessary except as it may be involved in discussion of the other item." (Inheritance tax levied by a foreign state).

While it is believed that this case goes a little far, it is believed that it announces the principle which should be controlling in this case. That is, that in this case since the devisee of the property, the executrix, has received the rent accruing on the real property since the death of the decedent, which rents have not been included in the assets of the estate, the deductions claimed herein should be paid by the executrix from the rental income received from the property.

Section 101-3-9, Utah Code Annotated 1943, provides:

> "In a specific devise or legacy the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the court to sell the property devised and bequeathed in the cases herein provided."

Thus the real property in this case passed to the devisee immediately following the death of the decedent and she was entitled to the property, and the income of the property, subject to any control the probate court might assert over the property.

In this regard the following is found in 32 Am. Jur., Landlord and Tenant, Section 448, Page 364:

"As a general rule, since rent to accrue is an incident of the reversion, upon the death of a lessor, who had reserved rent generally for the duration of the term, rents thereafter to accrue and to become payable either in money or in a share of the crops raised upon the premises do not devolve upon his executor or administrator for administration as a part of his personal estate, but descend at once, with the reversion, as real estate, to his heirs at law, or pass to the devisees who are entitled under his will to the reversion, unless otherwise disposed of by will . . . However, the right of an heir or devisee to future rent, as an incident of the reversion, is subject to charges upon the premises, to the payment of taxes upon the property, even though they were assessed prior to his acquisition of title, to homestead rights, and to whatever claim the surviving spouse of the lessor can assert in the premises by way of a right to dower or to a statutory distributive share in his estate. Moreover, as hereinafter stated, the rule which awards future rents to the heir or devisee of the lessor has been modified by statutes which permit the personal representative to take the rents unconditionally as in some jurisdictions, and for the payment of debts or for other specified purpose in other jurisdictions, and by statutes which provide for the sale of the real estate left by a decedent, in order to pay his debts . . ."

"It appears that a personal representative in accounting for rents collected by him as an agent for the heirs or devisees should be allowed a credit for payments made by him for taxes, insurance premiums, interest on encumbrances, and

> expenses of repairs, and that he should be entitled to retain a reasonable amount for his own compensation in looking after the rents and the premises, at least where he acted in these respects with the knowledge and consent of the heirs or devisees."

At 31 A. L. R., Page 27, appears an annotation of the various states as to who is entitled to rent accruing after the death of the landlord, and in all 23 jurisdictions cited the cases hold that in the absence of a provision in the will to the contrary the devisees under the will are entitled to receive the rents of the estate subject to any debts against the estate at the time of the death of the devisor.

The question as to what expenses should be taken from the corpus of an estate and what expenses should be taken from the income of an estate has arisen in many cases involving a dispute between those persons entitled to the principal of the estate and those entitled to the income of an estate. The case of Commercial National Bank of Charlotte vs. Charles A. Misenheimer and J. J. Misenheimer, appearing at 110 A. L. R. 1310 was an action brought by the executor for a construction and interpretation of the will of the testator. At the time of his death the testator owned four tracts of land as a tenant in common with Charles A. Misenheimer, one of the defendants. It appeared that the testator left personal property sufficient to pay all per-

sonal debts exclusive of those secured by deeds of trust on the real property. The lower court had made an order authorizing the executor, among other things, to collect one-half of the rents from the devised real estate, to keep a separate account, and to pay therefrom the pro rata share of the testator's estate for repairs, taxes, insurance, and interest on the mortgage indebtedness. The Supreme Court, in ruling on this question said:

> "While ordinary rents collected by the executor from the devised property would go to the devisee, the order from Harding, J., authorizing the application of collection of rents to repairs, taxes, insurance and mortgage indebtedness on the particular tracts from which the rents were derived, would not be injurious to the interest of the appellant and his exception to the order is without substantial merit."

In the case of Spring vs. Hollander, a Massachusetts case found at 158 N. E. 791, which involved a petition by a trustee appointed by the probate court to sell the lands of an estate, the question arose whether the taxes on the realty should be paid by the life tenant or should be deducted from the selling price of the land before the principal should be paid to the residuary legatee. The court decided that the ordinary taxes on the realty are to be paid by the life tenant and in doing so quoted the following from Wiggin vs. Swett, 6 Mete 194, at Page 201 (39 Amdec 716):

> "Taxes are properly payable out of the rent

> and income of real estate and therefore constitute a proper charge upon those who have the actual and beneficial use and enjoyment of the estate for the time being, whether it be in fee, for life, or for years."

In the case of Mahoney vs. Kearins, a Massachusetts case found at 184 N. E. 686, which arose upon a petition of the trustee for instructions as to what funds should be used to pay the taxes on real estate in which a life estate was devised to the daughters of the deceased, the following appears:

> "In the first case under paragraph 13 of the will the trustee is directed to hold the premises described therein in trust for the benefit of certain named daughters, 'with power on the part of my said daughters to occupy said homestead, according to the requirements set forth in paragraph 20 of this will'. It is plain that under this power the daughters named were given a beneficial interest in the homestead analogous to an equitable life estate. Assuming that power was exercised by any one of the daughters and that such an election created an equitable life estate in the donee, the rule is applicable, unless the will directs otherwise, that taxes, insurance, repairs and all incidental expenses of the ordinary maintenance of real estate held in the trust shall be borne by the life tenant. Taxes (insurance and repairs) are properly payable out of the rent and income of real estate, and therefore constitute a proper charge upon those who had the actual and beneficial use and enjoyment of the estate for the time being."

In re Jacob's Estate, 2 N. Y. S. 2d, 973, the decedent had bequeathed a sum of $3,000.00 to her executors in trust to be expended for a college course for her granddaughter with the provision that in the event that said granddaughter refused or was unable to pursue such course before she arrived at the age of 25 the $3,000.00 was to be paid to someone other than the granddaughter. The court of appeals had directed that the income from said trust fund be paid to the granddaughter, Ruth Jacobs, until she became 25 years of age, and that in the event she failed to qualify and take the principal sum, said sum of $3,000.00 should be paid to Clara Augusta Traver. Ruth Jacobs failed to qualify and the principal of the trust fund belongs to the appellant. The appeal was taken from an order of the court assessing a tax upon the interest of Clara Augusta Traver without certain deductions and claims first being deducted from the principal sum before the net sum on which tax deducted from the principal sum was arrived at. Among the items claimed to be deducted were the trustee's commission on the income derived from the trust fund, the attorney fees and costs and disbursements in proceedings instituted by the trustee to determine the rights of Ruth Jacobs and Clara Augusta Traver. The court held:

> "The trustee's commission on the income derived from the trust fund is not deductible . . . The allowances for attorney's fees to Ruth Jacobs and William H. Jacobs of $271.19, to Clara Augusta Traver of $136.96, and to the special guard-

> ian of $403.45, are clearly not deductible, as these are personal expenditures by the beneficiaries of the sums sought to be deducted for the benefit of their respective estates."

In discussing the matter of attorney fees the court said:

> "However, in this case the proceedings were instituted by the trustee appointed under the eighth paragraph of the will of the decedent and did not involve the whole estate of the testatrix but simply the rights of Ruth Jacobs and the appellant, Clara Augusta Traver, to the trust fund thereby bequeathed. The expenditures made by the trustee were for the benefit of these two beneficiaries alone and did not involve the whole estate. Under these circumstances these sums are not deductible . . .
>
> ". . . It may be stated as a general rule that expenses of litigation in conserving and preserving the corpus of the estate are proper deductions before the assessment of the tax; but the expenses of litigation by the distributees over their respective interests, which does not in any manner affect the size of the amount of the estate originally passing, should not be so deducted."

It is submitted that in the case at bar the real property of the decedent passed to the devisee, who in this case is also the executrix, immediately upon the death of the decedent subject to the payment of any expenses of the estate or claims against the estate in the event

the other assets of the estate were not sufficient to take care of these expenses or claims; that immediately upon the death of the decedent the devisee became entitled to the income produced by the rental property in question after the death of the decedent, subject to the limitations already mentioned; that since the devisee was entitled to the income of the rental property, that is, the beneficial use, she should pay the costs of repairs, insurance, taxes, and other incidental expenses of the ordinary maintenance of real estate. That the deductions claimed herein fall within that classification and should, therefore, be paid out of the income. That since the deductions claimed herein should have been paid out of the income produced by the rental property, they should not be deducted from the corpus of the estate, especially since none of the income derived has been included in the corpus of the estate upon which the tax in question is levied.

III.

Are the claimed deductions debts owing by the decedent at the time of his death?

Although it does not appear from the evidence that there were any rent agreements or leases, except on a month to month basis, in effect at the time of the decedent's death, which had not yet expired, even assuming this to be the case, it is submitted that any such leases do not constitute an obligation which falls within

the definition of a debt owing by the decedent at the time of his death for two reasons. First, the leases, if any, cease to be an obligation of the estate and become the obligation of the devisee of the real property, and second, the obligation is not a debt.

> "In the absence of a covenant otherwise providing, as a general rule a lease is not terminated by the death of the lessor or the lessee. The rule may be altered, however, by statute and the terms of the lease may be such as to terminate it on the death of the lessor . . ." 51 C. J. S., Section 92, Page 659.

> "On the death of the landlord, his tenant continues in the same relation to those who are by law entitled to succeed to the rights of the decedent until his disclaimer of such relation is made known to them, although, where one entitled to a part interest has leased the entire estate, a person who at the lessors death becomes entitled to the entire estate may hold the lessee as his tenant only as to the part interest to which the lessor was entitled." 51 C. J. S., Section 22d, Page 527.

In the case of Dobbelaar vs. Hughes, a New Jersey case decided at 156 Atlantic 469, an action to quiet title brought by a tenant against the heirs and devisees of the decedent, it was held that the tenant, by remaining in possession of the premises after the death of the intestate landlord became the heir's tenant by operation of law.

In the case of Main vs. Norman, 36 Atl. 2d 256, it was held that a land owner could not maintain an action against a deceased adjoining owner's estate for damages for failure to erect and maintain one-half of a division fence where plaintiff admitted that the fence was in good order at the time of the adjoining owner's death and claimed that losses resulting to him occurred afterwards from losses of sheep and loss of use of land since neither loss could afford basis of claim against the estate or suit against administrator as such.

The following definition of debt is taken from Hodgson vs. Marks, 300 N. Y. S. 661, 664; 165 Misc. 680:

> "The word 'debt' comes from the Latin 'debere', meaning to owe; 'debitum' meaning something owed. Bouvier's Law Dictionary (Rawle's third rev.) at page 786, defines it as a sum of money due by certain and express agreement; all that is due a man under any form of obligation or promise."

> "The distinguishing and necessary feature of a debt is that a fixed and specific amount is owing, and no future valuation is required to settle it."

In the case of Eckenrock's Will, 4 N. Y. S. 2d 582; 167 Misc. 632, the issue was as follows: At the date of his death, which occurred August 6, 1934, the decedent was the owner of certain real property at 97 Warwick Street, Brooklyn. Taxes against this property had been levied and finally determined for the year 1934 in the

total sum of $528.28 of which $264.14 became due and payable on April 1, 1934, and the latter sum on October 1, 1934. The widow, to whom the property was devised, paid the sum which fell due on October 1st, presented a claim therefore to the executors, and objects to their accounts by reason of its rejection. The court held that an installment of a real estate tax which did not become a debt until the date when it became due and payable was not a "debt" of decedent who died subsequent to the levy but prior to the date on which the installment was due, and hence executors were not required to reimburse devisee of property who paid installment when it fell due.

We may conclude from the foregoing that upon the death of the testator in this case the devisee stepped into his shoes as landlord and that thereafter the relationship of landlord and tenant ceased to exist between any lessee of the property and the decedent. Since there does not appear to have been any violation of any rental agreement prior to the decedent's death, and since the deductions claimed herein arose in the performance of leases after the decedent's death, when he had ceased to be the landlord, the claimed deductions were not "debts of the decedent owing at the time of his death."

CONCLUSION

It appears, therefore, that the deductions claimed herein should not have been allowed for the reason that

they do not fall within the definitions of any deductions which may be allowed under Section 80-12-7 or 80-12-8, Utah Code Annotated 1943. They are not administrative expenses incurred for the preservation of the estate for the reason that they do not meet the primary test for preservation expenses. That is, they were not incurred in good faith for the benefit of the estate, but rather were incurred for the benefit of the devisee under the will in producing rental income, to which, as we have seen, the devisee was entitled, and performing the devisee's obligations as landlord to the tenants of the real property. Moreover, since the rental income during the time in which the expenses were incurred is more than sufficient to pay the expenses of the real property on which the rental income is received, the devisee, receiving the benefit of the income, should pay the expenses of producing the income.

Finally, it appears that the obligation of the landlord to the tenants passed to the devisee, by reason of the devisee's accepting the benefits of such relationships, and thereby became the obligation of the devisee. That the executor in furnishing the services for which the deductions are claimed, was not discharging any obligation of the decedent, but the obligation of the devisee. And furthermore, that any obligation of the decedent to the tenant existing at the time of his death was not a debt due upon the death of the decedent as defined by the statutes for the reason that there was nothing owing.

There was not even a claim against the decedent at the time of his death by any tenant for the reason that he had not failed to perform any part of his obligation prior to his death, and therefore, there is no cause of action existing against him at the time of his death. Even were this true, any such claim has not been adjudicated or reduced to an amount certain as the law seems to require.

It is therefore the contention of the appellant herein that the court erred in allowing the deductions herein set out before arriving at the amount on which the inheritance tax was charged.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED that the judgment of the lower court should be reversed and the case remanded with directions to disallow the deductions claimed by the executrix and disputed by the Tax Commission.

Respectfully submitted,

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